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In The

# Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA, ex rel.
WILLIAM DEVLIN, ROD KODMAN,

*Petitioners,*

v.

STATE OF CALIFORNIA, COUNTY OF
MARIPOSA, and TOM ARCHER,

*Respondents.*

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

## JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a district court has jurisdiction over a *qui tam* action brought pursuant to the False Claims Act (31 U.S.C. §§ 3729 et seq.) where the allegations upon which it is based were publicly disclosed prior to the filing of the complaint and where the relators had no direct and independent knowledge of the information on which the allegations are based.

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## JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents State of California, County of Mariposa, and Tom Archer respectfully ask the Court to deny the petition for writ of certiorari filed by petitioners/relators William Devlin and Rod Kodman ("relators") for the reasons stated below.

## STATEMENT OF THE CASE

On February 11, 1992, relators filed a sealed *qui tam* suit pursuant to the False Claims Act (31 U.S.C. §§ 3729 et seq.) against the State of California, numerous counties of that state, and various officials of those counties.

On September 25, 1992, relators filed a sealed First Amended Complaint naming only the State of California, the County of Mariposa, and Tom Archer, an official of the County of Mariposa, as defendants. The First Amended Complaint alleged in pertinent part that beginning sometime in 1990, the Social Services Department of Mariposa County, at the direction of Tom Archer, who was then Unit Supervisor, began to take steps to fraudulently increase its federal funding by inflating case report statistics and creating false files.

On October 22, 1992, the district court entered an order stating that the United States had declined to intervene in the suit and that the complaint could be unsealed.

On December 9, 1992, defendants County of Mariposa and Tom Archer answered the First Amended Complaint. Defendant State of California filed its answer to the First Amended Complaint on June 10, 1993.

On June 11, 1993, defendants County of Mariposa and Tom Archer filed a motion to dismiss the action on the ground that the district court lacked subject matter jurisdiction pursuant to 31 U.S.C. § 3730(e)(4), in that the allegations upon which the action is based were publicly disclosed prior to the filing of the complaint and the relators were not the "original source" of the information. Defendant State of California joined in the motion to dismiss.

On July 19, 1993, the district court filed an Order Dismissing Action for Lack of Subject Matter Jurisdiction. The district court concluded that it lacked subject matter jurisdiction because there had been public disclosure of the allegations or transactions upon which the action is based prior to the filing of the complaint, and the relators are not the "original source" of the information. Judgment dismissing the action for lack of subject matter jurisdiction was entered on July 22, 1993. Thereafter, on July 26, 1993, an Order Correcting Order Dismissing Action for Lack of Subject Matter Jurisdiction *Nunc Pro Tunc* was filed correcting clerical errors in the order of dismissal.

On July 29, 1993, relators filed a motion for reconsideration of the district court's order dismissing the action. On September 2, 1993, the district court denied relators' motion for reconsideration. Relators filed a timely notice of appeal on September 10, 1993.

On May 24, 1996, the Ninth Circuit Court of Appeals affirmed the judgment of the district court.

## STATEMENT OF FACTS

On February 6, 1993, the *Mariposa Gazette* newspaper published an article entitled "Grand Jury asked to probe Child Protective Services" detailing certain allegations concerning the Child Protective Services ("CPS") agencies in Mariposa and Madera Counties.[1] According to the article, William Cotey, a former employee of Mariposa County CPS, requested the FBI and the grand juries in both Mariposa and Madera Counties to investigate the operations of the local CPS agencies. The article stated that "[o]ne element of Cotey's complaint to the Mariposa Grand Jury pertains to record-keeping of cases involving assistance to the homeless and the protective services to adults and children." App. 3. The article further states that "[c]entral to his complaint is a meeting Cotey attended with Archer and four fellow workers sometime in the past three years" in which "Cotey, in his letter to the Grand Jury, recalls that Archer – then head of the unit, now head of the Human Services Department – told them 'our CPS statistics were too low and that we needed to use everything we could to inflate these statistics to increase our funding.' " App. 3. The article also discussed allegations concerning the creation of false files and inflation of caseloads.

According to the declaration of relator William Devlin dated March 21, 1993, sometime prior to January 20, 1992, William Cotey contacted relator Rod Kodman

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[1] The February 6, 1993, *Mariposa Gazette* article is reprinted at App. 1 of the Appendix to this Joint Brief.

and informed him that he (Cotey) had information concerning fraud committed by employees of Mariposa County.[2] In his declaration, Devlin also stated that, during the week of January 13, 1992, Devlin interviewed Cotey regarding the alleged fraud and that "[i]t is at this time that the Relators received the information which formed the basis for this false claims action." App. 16. Mr. Devlin further stated in his declaration that "[t]he week before the February 6, 199[2] article appeared in the Mariposa Gazette, Mr. William Cotey, his wife Deborah Cotey and [Devlin] went to the Mariposa Gazette and gave a reporter, Jerry Rankin[,] the information that was contained in the article of February 6, 199[2]."[3] App. 16. The Declaration of Jerry Rankin dated June 25, 1993, confirmed the discussion with Mr. and Mrs. Cotey and Mr. Devlin.[4] Rankin further stated in his declaration that "[s]ometime after this conversation, [Rankin] contacted William Cotey again and had a conversation with him during which he gave me further details regarding this alleged fraud." App. 18.

On February 11, 1992, five days after publication of the *Mariposa Gazette* article, relators filed the action upon which this petition is based in the United States District Court for the Eastern District of California.

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[2] The March 21, 1993, Declaration of William Devlin is reprinted at App. 15 of the Appendix to this Joint Brief.

[3] The Declaration of William Devlin dated March 21, 1993, erroneously stated that the *Mariposa Gazette* article was published on February 6, 1993, instead of February 6, 1992.

[4] The June 25, 1993, Declaration of Jerry Rankin is reprinted at App. 18 of the Appendix of this Joint Brief.

In their First Amended Complaint, filed September 25, 1992, relators allege that Tom Archer directed employees of the Social Services Department of the County of Mariposa, California to fraudulently create false files to show that an investigation had been, or was being, carried on relating to child or adult abuse. Relators further allege that the purpose of this fraudulent activity was to inflate statistics of abuse cases handled by the County of Mariposa in order to increase federal funding.

## ARGUMENT

### I.

### THERE IS NO CLEAR CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS REGARDING THE PRECISE MEANING OF THE PHRASE "BASED UPON" IN 31 U.S.C. § 3730(e)(4). MOREOVER, THE FACTS OF THIS CASE DO NOT PRESENT THAT ISSUE

Relators argue that their Petition for Writ of Certiorari should be granted to resolve a conflict among circuits of the United States Court of Appeals. In support of their argument, they state that although the Ninth Circuit found this action to be barred by the provisions of 31 U.S.C. § 3730(e)(4), it would not have been barred in the Fourth, Eleventh, Fifth and Second Circuits due to differing interpretations of the phrase "based upon."

Relators are in error. There is no clear conflict among the circuit courts of appeals as alleged by relators. Moreover, based upon the facts of this case, relators' action would have been barred in all circuits no matter what interpretation of the phrase "based upon" as used in

section 3730(e)(4) was current in that circuit. Thus, under the facts of this case, the stated conflict is irrelevant. Because this case does not present the issue relators urge this Court to resolve, the petition should be denied.

31 U.S.C. § 3730(e)(4) provides in pertinent part as follows:

> "(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> "(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

Accordingly, a *qui tam* action must be dismissed if it is "based upon" publicly disclosed allegations *and* relators are not an "original source" of the allegations.

The conflict relators identify is over the precise interpretation of the phrase "based upon" in subdivision (A) of section 3730(e)(4). Relators argue that the phrase "based upon" must be read to require more than the public disclosure of allegations prior to the filing of a *qui tam* action. Relators further argue that there is a clear conflict among the circuit courts of appeals on this issue.

Relators are in error. There is no such clear conflict, and the underlying action would have been barred in all circuits.

### A. There Is No Conflict Among The Circuit Courts Of Appeals Which Warrants Review As To The Interpretation Of The Phrase "Based Upon"

Relators base their argument on the holding of the Fourth Circuit in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 at 1348 (4th Cir. 1994). In *Siller*, the Fourth Circuit held that the phrase "based upon" should be interpreted as "derived from." The Fourth Circuit specifically criticized the Second Circuit's prior holding in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2nd Cir. 1992) that public disclosure of an allegation in a *qui tam* action divests district courts of jurisdiction over a *qui tam* suit, regardless of where the relator obtained the allegation. *Siller*, 21 F.3d, at 1348. Relators argue that *Siller* has been followed by other circuits in *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995), *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2nd Cir. 1990) and *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2nd Cir. 1993), *cert. denied*, 508 U.S. 973 (1993).

Relators argue that these cases use a three-step analysis of the jurisdictional bar provided for by 31 U.S.C. § 3730(e)(4) as contrasted with a two-step, automatic presumption approach to the jurisdictional bar used in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318

(2nd Cir. 1992) and the underlying action, *United States ex rel. Devlin v. State of California*, 84 F.3d 358 (9th Cir. 1996). Relators argue that under an automatic presumption approach the only relevant fact is whether the allegations upon which the *qui tam* action is based were publicly disclosed prior to the filing of the *qui tam* action. They further argue that the automatic presumption approach has been followed by the Tenth Circuit in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 971 (1993).

However, an examination of the cases relied on by relators demonstrates that *Siller* does not have the progeny ascribed to it by relators.

Contrary to relators' argument, the Eleventh Circuit in *Cooper v. Blue Cross and Blue Shield of Florida, supra*, did not follow *Siller*. Instead, the Eleventh Circuit followed the reasoning of the Tenth Circuit in *United States ex rel. Precision Co. v. Koch Industries*, a case which relators claim is in conflict with *Siller*. Indeed, an examination of *Cooper* reveals that the reasoning of the Eleventh Circuit follows that of the Second Circuit in *Doe v. John Doe* and is similar to that of the Ninth Circuit in *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992). In *Cooper*, the dispositive fact in determining whether the *qui tam* action was "based upon" publicly disclosed allegations was that *Cooper* filed his *qui tam* action some five weeks after the public disclosure. *Cooper*, 19 F.3d at 567-568.

Similarly, the Fifth Circuit in *Federal Recovery Services, Inc. v. United States*, relied on the fact that the *qui tam* action was filed more than a year after the public disclosure of the relevant allegations in other litigation and

cited the Ninth Circuit's opinion in *Wang v. FMC Corp.*, as authority for the holding that the *qui tam* action was "based upon" public disclosures. *Federal Recovery Services, Inc.* at 451. Again, in *Wang*, the *qui tam* action was held to be "based upon" public disclosures because the disclosures preceded the filing of the *qui tam* action. Thus, *Federal Recovery Services* does not truly follow *Siller*.

The Second Circuit in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.* (alleged by relators to be part of the progeny in *Siller*) cited with approval the Tenth Circuit's holding in *Precision* that the statutory bar of section 3730(e)(4) applies to "a '*qui tam* action- . . . based in any part upon publicly disclosed allegations or transactions.' " *Kreindler*, 985 F.2d at 1158. Furthermore, the Second Circuit in *Kreindler* cited with approval its holding in *Doe v. John Doe* so roundly criticized by the Fourth Circuit in *Siller*. " 'Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information.' " *Kreindler*, 985 F.2d at 1158. Thus, the Second Circuit's reasoning is more akin to what relators describe as the automatic presumption approach than it is to what relators characterize as the three-step approach of *Siller*.

Again, relators attempt to show a conflict among the circuits by arguing that the opinion of the Second Circuit in *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2nd Cir. 1990) is part of the progeny of *Siller*. Yet the reasoning behind the Second Circuit's opinion in *Dick* is much more similar to the reasoning of that same circuit in *Doe v. John Doe Corp.*, decided two years later, than it is to the reasoning of the Fourth Circuit in *Siller*. According to the Second Circuit in *Dick*, " . . . for the reasons stated

hereinabove, we believe that if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred." *Dick*, 912 F.2d at 18. Again, the relevant factor is timing of the disclosure vis-a-vis the filing of the *qui tam* action.

Thus, contrary to relators' arguments, the reports of *Siller's* progeny have been much exaggerated. *Siller* does not have the progeny ascribed to it by relators. There is no conflict among the circuits which warrants review by this Court.

### B. Relators' Action Would Be Barred In All Circuits

Relators argue that review by this Court is necessary because their action, although barred under Ninth Circuit precedent, would not have been barred in other circuits. Relators are in error. A review of the facts in this matter demonstrates that no matter how the phrase "based upon" is used, relators here would have been barred from bringing this action.

As stated above, the Fourth Circuit in *Siller* has interpreted "based upon" as "derived from." *Siller*, at 1348. Other circuit courts of appeals have used differing words to interpret "based upon," but the general consensus among all other circuits is to preclude suits based in *any part* on publicly disclosed information. *Cooper*, 19 F.3d at 567; *Kreindler*, 985 F.2d at 1158; *Federal Recovery Services, Inc.*, 72 F.3d at 451. Here, no matter whether "based upon" is viewed from the *Siller* perspective, or from the

general perspective, the underlying action would be barred.

This is because relators' *qui tam* action is based upon or derived from disclosures of a non-relator, Cotey, including disclosures by Cotey to the media. Here, it is undisputed that relators obtained their knowledge of the information underlying the allegations from Cotey. *Cotey then, in the presence of the relators, disclosed the allegations to the media.*[5] Only subsequently did relators use these same allegations in their *qui tam* action. Cotey (the person who gave relators the information behind the allegations in their complaint) disclosed these allegations to the media, albeit in the presence of relators, prior to the filing of the *qui tam* action. The allegations of the *qui tam* action are thus derived from publicly disclosed information.

The only way to harmonize relators' reading of the statutory jurisdictional bar of section 3730(e)(4) with the actual wording of that statute would be to insert the word "solely" before the words "based upon." The circuits that have considered this tortured reading of the statute have declined to read the word "solely" into the statute, as to do so would alter the statute's plain meaning. Indeed, three of the cases cited by relators as being *Siller's* progeny explicitly declined to read the word "solely" into section 3730(e)(4): *Cooper*, 19 F.3d at 567, *Federal Recovery Services*, 72 F.3d at 451, and *Kreindler*, 985 F.2d at 1158.

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[5] This fact is glossed over in relators' Statement of the Case.

Therefore, even under the most liberal interpretation of *Siller*, the facts of the underlying action raise the jurisdictional bar of section 3730(e)(4).[6] That being the case, the underlying action does not present the issue relators seek to raise before this Court. Even if there is a conflict among the circuit courts of appeal sufficient to warrant review by this Court, this action does not present that issue. This Court will not decide an issue unless there is a live case or controversy before it. *Kremens v. Bartley*, 431 U.S. 119, 128-129 (1977). On this ground alone, the petition for writ of certiorari should be denied.

### C. The Ninth Circuit's "Cursory" Analysis Of The Issue Relators Seek To Raise Stems From Relators' Concession Of This Issue Below

Relators rely on what they characterize as a "cursory" analysis of the phrase "based upon" by the Ninth Circuit. However, a major reason for that cursory review is that the issue relators seek to address was not raised before the Ninth Circuit. A review of relators' briefs before the Ninth Circuit discloses that they did not address this issue, thus waiving it.[7]

The only issue relators briefed on appeal was whether they were an "original source" as that phrase is used in section 3730(e)(4). Relators did not challenge the

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[6] And, as shown below, there is no basis for any circuit court of appeals to hold that relators were the original source of the allegations in the *qui tam* action.

[7] The relators' briefs before the Ninth Circuit are reprinted at App. 20 and App. 40 of the Appendix to this Joint Brief.

finding of the district court that their *qui tam* action was "based upon" publicly disclosed allegations. Therefore, there was no necessity for more than a cursory review of this issue by the Ninth Circuit.

## II.

## CONGRESS INTENDED TO EXCLUDE PERSONS SUCH AS RELATORS WHEN IT REQUIRED THAT AN "ORIGINAL SOURCE" BE AN INDIVIDUAL WITH DIRECT AND INDEPENDENT KNOWLEDGE

Relators argue that this Court should grant their petition in order to review whether or not relators who merely republish an allegation that already has been publicly disclosed should be rewarded by the False Claims Act. Persons such as relators have never been rewarded by the False Claims Act, nor should they be.

31 U.S.C. § 3730(e)(4)(B) defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

In *Wang*, 975 F.2d at 1419, the Ninth Circuit described who qualifies as an "original source."

> "The paradigm *qui tam* plaintiff is the 'whistleblowing insider.' *Stinson*, 944 F.2d at 1160. *Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot.

> "It is important to note that under the rule we adopt today, *all* those who 'directly or indirectly' disclose an allegation might qualify as its original source. *Dick*, 912 F.2d at 18. Anyone who helped to report the allegation to either the government or the media would have 'indirectly' helped to publicly disclose it. If, however, someone *republishes* an allegation that already has been publicly disclosed, he cannot bring a *qui tam* suit, even if he had 'direct and independent knowledge' of the fraud. He is no 'whistleblower.' A 'whistleblower' sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a 'conspiracy of silence,' and not their mimics." (Emphasis in original.)

In *Wang*, the relator had "direct and independent knowledge" because he was a mechanical engineer who worked on the problem and "saw [it] with his own eyes." *Wang*, 975 F.2d at 1417. His knowledge was "direct and independent" because "it was unmediated by anything but [his] own labor." *Id.*

The Third Circuit has defined "direct" as used in this context as "marked by absence of an intervening agency, instrumentality, or influence: immediate." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149, 1160 (3rd Cir. 1991), quoting *Webster's Third New International Dictionary* 640 (1976).

In this action, William Cotey is the "original source" of the information on which the allegations are based. The record establishes that it was Cotey, a former employee of Mariposa County CPS, who first reported the information on which this action is based to the

relators and to the media. The record also establishes that sometime after the initial discussion among William Cotey, Deborah Cotey, William Devlin, and the *Mariposa Gazette* reporter, and prior to the publication of the newspaper article, the *Gazette* reporter contacted William Cotey again and had a conversation with him during which he provided the reporter with further details regarding the alleged fraud. Thus, as the "whistleblowing insider" Cotey is "the paradigm *qui tam* plaintiff." *Wang*, 975 F.2d 1419, citing *Stinson*, 944 F.2d at 1160.

As the Second Circuit stated in *Stinson*, 944 F.2d at 1154:

> "One theme recurring through the legislative history [of the 1986 amendment] is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud. Congress sought to stop the 'conspiracy of silence' among employees of corporations engaging in fraud. *See* S.Rep. No. 345, 99th Cong. 2d Sess. 6, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5271. The Senate Report stresses that in order to detect fraud it was necessary to enlist the 'cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity.' *Id.* at 4, U.S. Code Cong. & Admin. News 5269."

Relators are not persons with "first-hand knowledge of fraudulent misconduct"; they are not "individuals who are either close observers or otherwise involved in the fraudulent activity." *Stinson*, 944 F.2d at 1154. Relators do not have any personal knowledge of the alleged fraud; they saw no fraud with their own eyes. *Wang*, 975 F.2d at 1417. Their knowledge is not unmediated by anything but

their own labor. *Id.* Relators' obtained all of their information concerning the alleged fraud *indirectly*, since it was provided to them by Cotey, who is an "intervening agency, instrumentality, or influence." *Stinson*, 944 F.2d at 1160. Relators' knowledge is therefore *dependent* on Cotey. Thus, relators' knowledge of the information on which the allegations are based is not "direct and independent." 31 U.S.C. § 3730(e)(4)(B).

Relators argue that since they possessed the information upon which the action is based in advance of the media disclosure, and since they played a part in disclosing the allegations, they should be rewarded. The fact that relators may have possessed the information upon which the action is based in advance of the media disclosure does not, however, mean that they have "direct and independent" knowledge as required by section 3730(e)(4)(B). As discussed above, relators obtained all of their information concerning the alleged fraud *indirectly* from Cotey; their knowledge is *dependent* on Cotey. They do not have first-hand knowledge of the alleged fraud, and they are not either close observers or otherwise involved in the alleged fraudulent activity. *Stinson*, 944 F.2d at 1154. They saw no fraud with their own eyes. *Wang*, 975 F.2d at 1417. Thus, notwithstanding the fact that relators may have possessed the information upon which the action is based in advance of the media disclosure, relators do not have "direct and independent" knowledge and, therefore, do not qualify as an "original source" under 31 U.S.C. § 3730(e)(4). As stated in *Stinson*, 944 F.2d at 1161:

> "This is in accord with the relevant caselaw. In *United States v. Rockwell Int'l Corp.*, 730 F.Supp.

> 1031, 1036 (D.Col. 1990), the court dismissed a *qui tam* action brought by the Taxpayers Against Fraud, a nonprofit corporation, which learned about the alleged fraud from a whistleblowing insider, because the corporation had no direct and independent knowledge of the information."

Relators argue that fraudulent activity in government offices such as county Child Protective Services will not come to light because of confidentiality statutes unless the "original source" requirement is read more broadly. However, relators' argument is belied by the facts of this case. Here, claims of fraud in the Mariposa County Child Protective Services agency were disclosed publicly by Cotey. Thus, it is clear that confidentiality statutes do not prevent allegations of fraudulent activity from being disseminated.

Thus, the petition for writ of certiorari should be denied. A broader reading of the original source requirement is not warranted as allegations of fraudulent activity were disseminated by the paradigm insider and potential *qui tam* plaintiff. Relators here contributed nothing significant to exposure of the alleged fraud and merely went along for the ride. Such persons were never meant to be rewarded by the False Claims Act.

## CONCLUSION

The Petition for Writ of Certiorari should be denied. Relators have unsuccessfully attempted to manufacture a conflict among the circuits which warrants review by this Court. Relators have not shown that the Fourth Circuit's

criticism of the Second Circuit's approach to the interpretation of the phrase "based upon" in section 3730(e)(4) has been followed by other circuits. Although relators allege that the Ninth Circuit only cursorily reviewed the meaning of the phrase "based upon," this is because relators failed to raise this issue before the Ninth Circuit.

Moreover, because relators based their allegations in the *qui tam* action on allegations previously publicly disclosed by the person with direct and independent knowledge of the information on which those allegations are based, even the Fourth Circuit would have dismissed relators' action. Therefore, the facts here do not present the issue relators seek to raise before this Court. For this reason alone, the petition should be denied.

The *qui tam* action was properly dismissed because it was based upon allegations previously publicly disclosed and relators are not the original source of those allegations in that they have no direct and independent knowledge of the information on which those allegations are based. Because the one person with that direct and

independent knowledge is not a relator, the petition should be denied.

Dated: September 26, 1996.

Respectfully submitted,

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**Weekly**
**Mariposa Gazette**
**[LOGO]**

**Thursday, February 6, 1992**

**Grand Jury asked to probe**
**Child Protective Services**

**By Jerry Rankin**

A Mariposan locked in a bitter child custody struggle is asking the FBI and grand juries here and in Madera to investigate the operations of the local government agency which protects children.

And on Monday, he also filed claims for $25 million each with the board of supervisors in Mariposa and Madera Counties for allegedly mishandling his case.

The supervisors normally deny such claims, which then legally frees the complainant to file a lawsuit in civil court.

The FBI confirms it is looking at the Mariposa County situation – not as a criminal matter but as possibly requiring review by the federal agency which funds such services.

Tom Archer, head of the Mariposa County Child Protective Services, says he is surprised and hurt at the request for an investigation of his unit. He believes it provides better and more thorough examination of cases involving child welfare than any other county in the state.

Ironically, it is a former employee of his, Bill Cotey, who is asking for the investigations – and Cotey praises the local CPS operation.

"The Mariposa CPS unit is the best in the state." he told the *Mariposa Gazette*. "I do have an axe to grind against the system, but not against Mariposa CPS."

Yet, in a complaint mailed to the Mariposa Grand Jury last week, he declares: "Child Protective Services is an agency out of control and operating well beyond the scope and intent of the legislature. . . . Having formerly been employed by the Mariposa (County) Department of Social Services, I feel that there is widespread abuse of power and authority by officers of Child Protective Services upon children and parents alike that destroys the unity of families and jeopardizes the health and safety of innocent children."

Still, Cotey says he would prefer his family's personal custody case were being handled in this county, instead of Madera, and stresses that his concern is for the CPS system statewide. He isn't alone.

Grand Jury investigations into CPS operations are under way in Merced and San Diego Counties, and critics of the system are pressing for other counties to follow.

In those counties, parents have accused the system of illegally taking their children, charging the parents with a crime and then dropping the charges.

Hundreds of people asked for the San Diego investigation, and a report is due this month. In Merced County this week, a couple whose children were taken from them filed a $37.5 million claim against the county. Criminal charges had been filed against George and Linda Forsyth, but then dropped.

Charles Davenport, foreman of the Mariposa County Grand Jury told the *Gazette* he hasn't seen Cotey's complaint yet. However, he said, "we take a look at all complaints." It will be turned over to the appropriate committee and "if it's deemed within our jurisdiction, we'll proceed on it."

Cotey and critics of Merced CPS are preparing to file civil lawsuits once the Grand Jury involvement is over. Such suits have been difficult to win in the past.

State law specifically exempts professionals such as doctors who report possible child abuse from being sued for damages. And it also grants immunity to the social workers who operate the system.

However, a recent U.S. Supreme Court ruling dealing with suits against the government has given the critics renewed hope that they can prevail in court.

One element of Cotey's complaint to the Mariposa Grand Jury pertains to record-keeping of cases involving assistance to the homeless and the protective services to adults and children.

Central to his complaint is a meeting Cotey attended with Archer and four fellow workers sometime in the past three years.

Recollections of the meeting are dramatically different.

Cotey, in his letter to the Grand Jury, recalls that Archer – then head of the unit, now head of the Human Services Department – told them "our CPS statistics were too low and that we needed to use everything we could to inflate these statistics to increase our funding. Mr.

Archer stated that his wife, Melody Archer, had shown him how to do some 'creative things' with the statistics." (Melody Archer runs Child Protective Services in Merced County.)

In an interview, Archer declared there is "absolutely no validity to that; I would never falsify or contrive a report of falsified figures." He recalls such a meeting but says Cotey is simply wrong in the message he feels he received.

Archer says when he took over the unit in March 1988, the staff "weren't doing their paperwork. . . . Our statistical reporting was an abomination. An awful lot of work being done here wasn't being counted."

He said he ordered that changed, both as a standard administrative procedure and to make sure that the county got all the money coming to it for areas where caseload influences funding. And he said he did mention his wife, because her office handles thousands of cases a year and she is expert in the field.

Archer provided statistics which show the CPS workload has, indeed increased. In 1987, the office reported 226 cases for the year; it was 215 in 1988. But for 1989, under his philosophy that "no work is done until the paperwork is complete," the cases soared 72% from the previous year to 370.

However, they fell to 367 in 1990 and dropped to 260 in 1991.

He says a group of factors in 1988 and 1989 boosted the caseload. For example, the state tightened its reporting rules even as he also applied the screws.

The local staff developed new programs to work more closely with those who might spot possible abuse. In one program in the 1988-89 school year, 1,158 children and school personnel were reached by a child assault prevention program. That was followed by a jump in referrals the first half of 1989.

And, the department reorganized, which allowed specialization in child protective matters. Archer comments: "Stress and frustration levels are unusually high in the children's services delivery system because our mission is so critical, the children and families in crisis so vulnerable and the variables and judgments required so unlimited."

During the interview, Archer called in Dianne Austin Bondshu of the CPS operation, who also had been at the meeting Cotey cited.

She told the *Gazette* her memory of the meeting is similar to Archer's.

"We were probably lax on statistics," she recalled, and said Archer was adamant that the record-keeping be complete and accurate.

But, she added, "We have never created a statistic – it would be too much work, for one thing."

Archer echoed her, and wondered what the value of double-counting of cases would be.

Only the CPS cases, he said, are caseload-funded by the state, which is relaying federal dollars.

Inflating or creating false files would be a tremendous drag on a small staff and the payoff wouldn't be worth it, he said.

He also said that his salary and that of his staff is not affected by caseload, so they couldn't benefit personally from fiddling with the files.

Marilyn Lewis, a program manager with the State Department of Social Services which oversees CPS, told the *Gazette* it is possible and accepted for a case in one category to also be counted in another.

However, she said, it would be "clearly inappropriate" to deliberately inflate caseloads. "I've not heard of it happening."

If it did, she said, "it probably would call for personnel action on the part of the county."

Cotey says he kept track in his personal records of instances in which, for example, a case involving aid for a homeless man might also be counted as a CPS case, starting in early 1989.

He sent his information to the FBI in Fresno.

There, Special Agent Jim Hyndman confirmed receipt of the complaint.

Asked if it was being treated as a criminal matter, he replied "not that I'm aware of."

He said it appears to be a situation where the agency providing the funding should do an audit and determine "what kind of controls need to be implemented." It should be "handled administratively," he said.

But the major thrust of Cotey's complaint to the Grand Jury is on CPS in general in California, and his own bizarre case in particular.

Cotey, a former police officer and deputy sheriff in Wisconsin, admits to an enormous amount of frustration.

He joined the social services department in 1987. His duties included helping the homeless and victims of domestic violence, liaison with the community groups that refer people to the department and occasional CPS cases.

In a job performance review, Archer had said Cotey "continues to do an excellent job. . . . His participation is always professional and his analysis and comments always contribute to developing a sound service plan. Bill's job skills, judgment and loyalty remain uniformly excellent and his maturity and dependability are a major asset in a highly stressful program."

But, when he resigned last Dec. 19 after being on sick leave since August, Cotey cited his case and rapped the system in his letter to Archer: "I'm very bitter about this. I do not feel that I can be objective in dealing with these cases any longer. . . . I am very disappointed that my own department and the people I have worked with for years have been unable to have anything to do with the CPS investigation in our case."

While he can't legally comment on Cotey's specific case, Archer says it would be a clear conflict of interest for his department to investigate a case involving an employee. Cotey responds that since he no longer is an employee, that obstacle has been removed.

Cotey was married last summer to Debra Dexter, mother of a 2-year-old son and 4-year-old son. Their father lives in Ahwahnee, Madera County.

Debra already had been involved in a struggle with the father over custody of the children for several months.

In February, Madera County Superior Court Judge John De Groot granted joint custody, with the father getting primary custody and Debra allowed regular visitation.

But soon, she sought to have the children live with her in Mariposa County. She said she had signed an agreement giving the father primary custody because he said that was the only way she would get to see them.

Lynn Bundy, a conciliation specialist, did a report for the court critical of both parents to some degree.

But the report said Debra "fits a rather classic profile of an abused spouse."

The report described the father as "an intensely angry, self-absorbed and immature individual. . . . His overall credibility is rather poor. . . . "

In April, the court awarded physical custody of the boys to Debra.

And in September, Judge De Groot formally confirmed that, allowing joint custody but this time with Debra holding primary custody and the father given visitation.

The judge pointed out that Debra admitted past drug and alcohol problems, but noted she was in counseling.

Debra is an Indian, and workers from Indian welfare agencies in two counties described her as a caring and competent mother. "The children are properly cared for and . . . their health needs are being met," the judge wrote.

He also said that the father had a drug abuse background. And the father's "testimony demonstrated an inappropriate hostility to these proceedings and confirmed (the conciliator's) assessment of him as an immature individual," the judge said.

He added:

"The children are now in a stable family environment and receiving appropriate care. It is in the best interests of the children that the continuity of this favorable environment be maintained at this time."

The Coteys thought that would settle it.

During the year, they had reported to the Mariposa sheriff's office that they had received threatening phone calls. And before 1991 was over, the propane tank at their home was vandalized, and Cotey's car caught fire while Debra was driving to Ahwahnee with one of her other children.

In August, Mariposa County Superior Court Judge Richard McMeehan issued a restraining order against the boys' father, ordering him from harassing Debra or her family, and to stay at least 100 yards away from the Coteys. Cotey reported to the sheriff's office that the father later violated the latter condition.

Then came Thanksgiving.

The two boys were visiting the father in Madera County when the father reported to its sheriff's office that the 4-year-old accused Bill Cotey of sexually molesting him.

Madera County's Child Protective Services office immediately ordered the children to remain with the father and not return to Debra.

In early December, Madera County CPS worker Kathy Marklund, in a report to the Juvenile Court there, said she found the 4-year-old's statements to be "consistent and believable."

The court agreed and ordered that the father should continue to have the children.

Cotey finds this decision puzzling.

He points out that he immediately offered to leave the household until the issue was resolved.

He notes that one of the Madera CPS workers in his case is Lorie Snider, whom he had complained about to authorities there when he referred cases from Mariposa County.

Cotey says that when Snider came to Mariposa County to investigate his case, she basically refused to talk to him.

He says she also refused to look at the court documents in which the conciliator and judge criticized the man accusing Cotey.

Sandy Scott, the new head of CPS in Madera County, wouldn't respond to questions about Cotey's case, citing

state law protecting the privacy of those in the CPS system.

However, she said that in general terms a potential conflict of interest on a caseworker's part "sounds like something that should be looked into."

She added that "complaints are taken seriously, not just thrown in the waste basket."

But the most important factor in his defense, Cotey says, is that Mariposa County Sheriff's Deputy Brian Muller investigated the molestation complaints, talked twice to the child and didn't file charges.

In his report, Muller states that in his presence the alleged victim did discuss the accusation with his mother, Debra.

In this conversation, according to the report, the boy said his father made him accuse Cotey. The boy said "no" when asked if Cotey had molested him, the report states.

And in this conversation the boy accused the father of molesting him and said he didn't want to stay with him. Muller faxed that report to Madera authorities.

Finally, Cotey points out that he was given a lie detector test at his insistence on Dec. 30.

Cotey was asked if he had been involved in any sexual acts with the boy, and if he had done the specific acts the boy alleged. He answered "no" to each question.

The report from State Justice Department polygraph examiner Robert Liburdy states: "It is the opinion of this examiner that Cotey was truthful in his answers to the relevant questions."

This isn't the only accusation of sexual molestation against Cotey. He freely admits that an older daughter in Madera County once accused him of molestation. He said she was drunk and later recanted the accusation to the sheriff's office there; she was returned to his home.

Why, Cotey wonders, are the two boys still allowed to be kept by their father when the father also has been accused of molestation, including in a letter written just last month by a daughter of Debra's, and when Cotey has been cleared by the sheriff's office here and passed the lie detector test?

Madera County, he wrote to the Mariposa County Jury, is "placing (the boys) into the very environment from which they should be protected." He suggests they at least should be placed in a foster home, the safe refuge normally used by a court when there is question about a child's welfare in its own family.

(The boys' father and his attorney could not be reached for comment on the case.)

That and his other complaints about the Madera operation are contained in Cotey's request for the Grand Jury investigation there.

"How they could get all that information and not do anything doesn't make sense," he says.

He notes that other children also have been affected by the case.

For example, he has voluntarily stopped seeing his own son, who lives in the area, until the matter is resolved.

And Debra's 10-year-old daughter – who also lived with the Coteys – has been sent to live with a relative, under pressure from the Madera County social workers.

Making the case even more unusual and complicated is the fact that the two boys are enrolled Chukchansi Indians. Under federal law, this gives them special protection.

The Coteys are seeking to have Bureau of Indian Affairs lawyers take over the case and move it to federal court, contending the CPS caseworkers already have broken the law by ignoring the rights of the boys under federal law.

A federal lawyer is to arrive this week to consider the case.

Meanwhile, both sides were back in Juvenile Court in Madera on Monday.

Cotey said the attorney appointed by the court to look after the interests of the children had been provided no documents relating to the case.

He furnished a set and the attorney, Linda Thompson, sought to remove the children to a foster home for the 30 days it will take her to investigate the case from all aspects.

However, Superior Court Judge Edward Moffatt left the children temporarily with the father, but agreed to hear motions in 30 days to take them away from the father and to transfer jurisdiction to federal court in Fresno.

Debra told the *Gazette* that if nothing else, the case should demonstrate to the public that there are routes outside CPS available when parents feel aggrieved by how they are treated by the system.

She declared: "I'm in the right and they're in the wrong."

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Relators, in pro per

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, et al.,<br>Plaintiffs<br>vs.<br>TOM ARCHER, et al<br>Defendants | CIVIL ACTION NO. CV-F-92-5086-REC<br>**DECLARATION OF WILLIAM DEVLIN** |

I, the undersigned, declare:

1. I am one of the relators in the above captioned action.

2. In November of 1992, I was working for Rod Kodman in preparing documents for the submission of a claim for damages to Merced County. As a result of his filing such a claim and ensuing publicity in the Merced Sun Star, Mr. Kodman informed me that he was contacted by William Cotey, a former employee of Mariposa Child Protective Services who told Mr. Kodman that he had

information on fraud committed by employees of Mariposa County. This contact was made sometime prior to January 20, 1992.

3. During the week of January 13, 1992, I met and interviewed Mr. Cotey and thoroughly interrogated him regarding the fraud. It is at this time that the Relators received the information which formed the basis for this false claims action. Some time after this interview, I prepared petitions to the grand juries in Mariposa and Madera Counties for Mr. Cotey. These petitions requested an investigation of Child Protective Services.

4. The week before the February 6, 1993 article appeared in the Mariposa Gazette, Mr. William Cotey, his wife Deborah Cotey and I went to the Mariposa Gazette and gave a reporter, Jerry Rankin the information that was contained in the article of February 6, 1993. Mr. Rankin was the author of that article. At the time we talked to Mr. Rankin of the Mariposa Gazette, he had no knowledge of the fraud and our contact with him was the first time he learned that any fraud was taking place.

5. After the newspaper published their article based on the information we had supplied them, the Relators made the decision that due to the publicity about the fraud in the Gazette we should file our suit immediately and did in fact file it on February 11, 1993.

6. Some time after giving the information to Mr. Rankin of the Mariposa Gazette, I personally contacted some of the persons whose files were the subject of the fraud. I had been given the names of these persons shortly prior to my going to the Gazette and talking to Mr. Rankin. Several of these persons advised me that the

services allegedly rendered them and which we believed the United States was billed for had never been rendered.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This 21st day of March, 1993

/s/ William Devlin
William Devlin

## EXHIBIT "C"

## DECLARATION OF JERRY RANKIN

Jerry Rankin declares as follows:

1. I am a reporter for the Mariposa Gazette and was employed in this capacity on or about January 13, 1992.

2. On or about January 13, 1992, I was in the office of the newspaper during the evening William Devlin, Deborah Cotey and William Cotey used the newspaper's copier to photocopy some documents.

3. During the course of their copying those documents, I discussed with them the problems that William Cotey was having with Child Protective Services of Madera County. During the course of that conversation, I learned that the documents they were copying contained records of alleged fraud by Mariposa County whereby the county and its employees allegedly falsified records to increase their Federal funding. At this time, I discussed this alleged fraud with Mr. Cotey, Deborah Cotey and William Devlin.

4. Sometime after this conversation, I contacted William Cotey again and had a conversation with him during which he gave me further details regarding this alleged fraud.

5. On February 6, 1992, the Mariposa Gazette published an article written by me describing this alleged fraud and a petition to the grand jury presented by Mr. Cotey. This article began with the headline "Grand Jury asked to probe Child Protective Services".

I declared under penalty of perjury that the foregoing is true.

| | |
|---|---|
| /s/ Jerry Rankin | 6-25-93 |
| Jerry Rankin | Date |

App. 20

NO. 93-16729

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**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

Plaintiff/Appellant,

v.

STATE OF CALIFORNIA COUNTY OF MARIPOSA, *et al.*

Defendants, Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. ROBERT E. COYLE, JUDGE
CV-F-92-5086-REC

---

# OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

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NO. 93-16729

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**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

Plaintiff, Appellant,

v.

STATE OF CALIFORNIA COUNTY OF MARIPOSA, *et al.*

Defendants, Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. ROBERT E. COYLE, JUDGE
CV-F-92-5086-REC

---

# OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

---

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the trial court in error in its finding that it lacked subject matter jurisdiction of this cause?

a. Was the trial court in error in its finding that the Relators/Appellants were not the "original source" of

the information on which the news media disclosure was based.

## STATEMENT OF JURISDICTION

This action was brought by Relators Devlin, Kodman and Sidicane pursuant to the False Claims Act, 31 U.S.C. §3729. Jurisdiction of the action was conferred on the district court by 28 U.S.C. §1331 (federal question) and 31 U.S.C. §3732(a) (False Claims Act).

A document entitled "ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION" was filed in the district court on July 22, 1993 (CT 67); on July 26, 1993 the court issued its 'ORDER CORRECTING ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION" *Nunc Pro Tunc* (CR 68). That "ORDER" effectively granted judgment to the Defendants and terminated the proceedings. Thereafter on July 29, 1993, Relators filed a motion for Reconsideration (CR 69). A document entitled "ORDER DENYING MOTION FOR RECONSIDERATION" was filed by the court on September 2, 1993 (CR 74). On September 10, 1993, the Appellants William Devlin, Rod Kodman and Stanley Sidicane filed their notice of appeal from the final order terminating the case (CR 75); Rule 57, Federal Rules of Civil Procedure. The Notice of Appeal was timely. Rule 4, Federal Rules of Appellate Procedure.

Jurisdiction of the appeal is conferred upon this court by 28 U.S.C. §1291.

## STANDARD OF REVIEW

The district court's Order terminating this litigation is subject to *de novo* review. The district court's ruling on questions of law are review *de novo, Los Angeles Memorial Coliseum Commission v. National Football League,* 791 F.2d 1356, 1360 (9th Cir. 1986).

## STATEMENT OF THE CASE

On February 11, 1992, Relators William Devlin, Rod Kodman and Stanley Sidicane filed a *qui tam* action under the False Claims Act against the State of California, several counties of that state and various officials of those counties. A First Amended Complaint was later filed (CR 18).

On October 22, 1992, an order was entered stating that the United States had declined to intervene in this action, unsealing the complaint and relators to pursue the case in the name of the United States.

This First Amended Complaint was served on the Defendants Mariposa County, Tom Archer, a supervisory official of that county's Department of Social Services and the State of California, who answered it on December 9, 1992 (CR 23) and June 10, 1993 (CR 54).

The First Amended Complaint alleged that beginning sometime in 1990, the Social Services Department of Mariposa County, California, at the direction of Defendant Tom Archer, an employee of that county, fraudulently increased its Federal funding by having his employees falsify records of families receiving assistance under various federally funded acts. It alleged further that by

doing so, Mariposa County received Federal funds for investigations and activities which had never been conducted. It also alleged that certain time records had been fraudulently inflated to increase the county's federal funding.

It alleged further that False claims based upon the records of these falsified or inflated cases were then submitted to the State of California which transmitted them to the United States Government for payment. The United States then paid funds to the state and county based upon these false claims.

The First Amended Complaint alleged that Plaintiffs informed the State of California of these false and/or fraudulent claims and said state and its officials failed to take any action to investigate, reclaim and/or repay the monies unlawfully obtained by the other defendants. It was alleged that based upon the presentment of these false claims, monies were fraudulently received by the State of California and Mariposa County. In addition to the fraud committed by Mariposa County and Tom Archer, the State of California and its officials, in failing to investigate and/or take any action to reclaim and/or repay the monies that were fraudulently received also violated the False Claims Act.

On June 11, 1993, Defendants Tom Archer and the County of Mariposa filed a Motion to Dismiss the Complaint (CR 55) and accompanying brief (CR 56), alleging that the court lacked jurisdiction over the subject matter of the action because the allegations upon which the action was based were publicly disclosed in the news media prior to the filing of the complaint. It alleged

further that Plaintiffs/Appellants were not the "original source" of the information.

This Motion claimed that on February 6, 1992, the Mariposa Gazette newspaper published an article detailing the same allegations which were contained in the First Amended Complaint which was filed five days later. The article attached to the brief, stated in pertinent part that Bill Cotey, a former employee of Defendant Archer's filed a complaint with the Mariposa County Grand Jury outlining the fraud which formed the basis of the First Amended Complaint. Attached to the motion was the article which appeared in the Mariposa Gazette (CR 56, exhibit 1), a declaration of the managing editor of the newspaper stating that the article was published in the Gazette on February 6, 1992 (CR 57).

The motion also attached a declaration of relator William Devlin filed in connection with discovery matters in the case, (CR 56, exhibit 2). This declaration stated in essence that prior to January 20, 1992 relator Rod Kodman had been contacted by William Cotey and that Devlin interviewed Cotey regarding the allegations of Fraud during the week of January 13, 1992. It stated further that prior to the publication of the Gazette article, Kodman and Devlin went to that newspaper and gave it the information which formed the basis of the article. Devlin stated that due to the publicity about the fraud in the Gazette article, it was decided to file the suit immediately and it was filed on February 11, 1993. (The record in this case will show that the February 11, 1993 date shown in the Devlin declaration was in error and the action was actually filed on February 11, 1992). This

Motion to Dismiss was joined in by Defendant State of California (CR 59).

Appellants/Relators filed an opposition to the Motion to Dismiss (CR 63) showing that (1) they had information related to the fraud prior to the disclosure in the Mariposa Gazette; (2) that prior to the publication of the article, Relators had both additional information regarding the fraud and documentary evidence explaining how the fraud was committed; and (3) the Relators were the ones that gave the information to the Mariposa Gazette upon which the article was based.

This opposition by the Relators contained the declaration William Devlin (CR 63, exhibit a) which showed that he went to the Mariposa Gazette with William and Deborah Cotey and that the article was based upon the information they gave to Jerry Rankin, the reporter who wrote the article. The Devlin declaration also showed that he was the one that drafted the request for the Mariposa County Grand Jury to investigate the local Child Protective Services agency. Devlin also declared that he made an independent investigation of Cotey's allegations and confirmed by independent witnesses that the fraud did exist.

The opposition also contained the declaration of Relator Rod Kodman (CR 63, exhibit B) declaring that certain information in the Mariposa Gazette article was in error, and that he and not Cotey informed the F.B.I. of the fraud. Kodman outlined numerous contacts he made with government officials attempting to have them take action about the fraud. These contacts contained independent evidence related to the fraud and were all were [sic]

made prior to the publication of the Gazette article. The contacts included letters to several congressmen requesting that they forward the information to the Attorney General of the United States, the United States General Accounting Office and the U.S. Inspector General. Attached to the Kodman declaration were several receipts including one showing that he had the information delivered to F.B.I. agent Hyndman on January 21, 1992 and Congressman Gary Condit on that same date.

Finally, the opposition contained the declaration of Jerry Rankin (CR 63 exhibit C), the Mariposa Gazette reporter who wrote the article verifying that his first information regarding the fraud was obtained from Relator Devlin and William and Deborah Cotey who were in the office of the Gazette copying documentary evidence related to the fraud.

The Defendant State of California filed its reply to the opposition of the Relators (CR 64) and, after oral argument on the motion was heard on July 12, 1993, the court granted Defendants' Motion to Dismiss (CR 66), finding that the court lacked subject matter jurisdiction because there had been public disclosure of the allegations upon which the action was based and that the Relators were not the "original source" of the information. This Order was thereafter corrected by the court (CR 68) *nunc pro tunc*.

On July 29, 1993, Relators filed a Motion for Reconsideration (CR 69) requesting the Court to reconsider its order dismissing the case. In this motion, Relators supplemented their proof that they had separate, independent evidence of the fraud and attached as exhibits, a

letter from William Cotey, outlining how he was one of the perpetrators of the fraud while he worked for Mariposa County, some of the ledger cards kept by Cotey documenting the fraud and ledger sheets used by Cotey to show fraudulent work which [sic] for which the United States was billed. The Motion also contained the declaration of Rod Kodman stating that these documents were in Relator's possession long before the newspaper article in the Mariposa Gazette (CR 69, p.8, 9) and that of Relator Devlin (CR 69, p. 10, 11) stating that he contacted several of the persons named on the cards and verified that the services Cotey claimed were rendered to these individuals had not in fact been performed. These documents were proffered to show that the Relators had direct and independent knowledge of the information upon which the allegations in the newspaper prior to the publication of the article.

Defendants Archer and Mariposa submitted their opposition to this Motion for Reconsideration (CR 72) this opposition was joined in by defendant State of California (CR 73).

On September 2, 1993, the Court entered its Order Denying Motion for Reconsideration (CR 74). This appeal followed.

## ARGUMENT

The Relators' position is simply stated. This is a classic case where the district court ignored or misinterpreted this court's ruling in *Wang ex rel. United States v. FMC Corp.*, 975 Fed.2d 1412 (9th Cir. 1992).

Appellants/Relators have conceded that an article in the Mariposa Gazette pre-dated the filing of this action by five days. That article contained a portion of the allegations upon which this False Claims Action was based. Ample proof was presented to the district court that the Gazette article was based upon information given the reporter by the Relators/Appellants who were at the newspaper with one of the perpetrators of the fraud.

Additional proof showed clearly that at the time the information was given the reporter who authored the article, Appellants/Relators had both oral and documentary evidence of the fraud and had verified by an independent investigation that the allegations were true.

Thus Plaintiffs/Appellants played a part in disclosing the allegations and based upon this court's decision in *Wang, supra*. they had direct and independent knowledge of the information upon which the allegations were based. Thus, the district court was in error in dismissing the action.

I. THE DISTRICT COURT HAS JURISDICTION OF THIS CASE SINCE THE APPELLANTS/RELATORS WERE THE ORIGINAL SOURCE OF THE INFORMATION PUBLICLY DISCLOSED IN THE NEWS MEDIA.

31 U.S.C Section 3730(e)(4) provides as follows:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless

> the person bringing the action is an original source of the information.
>
> (B)) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

It is abundantly clear from the declarations filed in this case that the Appellants/Relators qualify as the "original source" of the information since they had direct and independent knowledge of the information upon which the allegations were based and had voluntarily provided the information to various branches of the government including the F.B.I. and members of the United States Congress.

Examination of the proof before the district court in this action shows conclusively that Appellants/Relators possessed the information upon which the action was based in advance of the media disclosure. They had both oral and documentary evidence of the fraud prior to the disclosure. This evidence was in the form of a written statement from William Cotey, one of the perpetrators of the fraud which outlined how he submitted false records to his superiors for payment. Cotey's ledger cards and time sheets also in possession of the Appellants/Relators prior to the media disclosure showed the names of the cases involved in the fraud. Based upon interviews with Cotey and these documents, Relator William Devlin conducted an independent investigation and found the allegations to be substantiated.

The district court's decisions also contain the clear implication that only wrongdoer William Cotey qualified as the "original source" as that term is defined in the False Claims Act. It would appear that the district court concluded that the information given Relators by Cotey did not qualify as "direct and independent knowledge of the information on which the allegations are based" as that term is used in the Act. This implication carries with it the outrageous conclusion that if one is told of a fraud by one of its perpetrators, only that perpetrator can qualify to file the action if there is a disclosure which would otherwise bar the action except for its filing by an "original source."

The court should note that if a wrongdoer is to reduce his liability for filing false claims, pursuant to the provisions of 31 U.S.C. §3729(a)(7) he/she had an obligation to fully cooperate with the investigation and still would still be liable for double damages and costs. By implication, such a wrongdoer could not benefit from his/her acts by filing an action such as this one.

The case of *United States ex rel. Dick v. Long Island Lighting Co.* 912 Fed.2d 13 (2nd Cir. 1990) also supports the proposition that the Relators are the "original source" of the information and thus the action should not have been dismissed. This case was cited with approval by the 9th Circuit Court of Appeals in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992).

Careful examination of *United States ex rel. Dick v. Long Island Lighting Co., supra.* shows that by the term "original source" congress meant the original source of the public disclosure, not as the court concluded the

original source discovering the fraud against the United States. That case stated in pertinent part as follows:

> Since our fundamental task in interpreting a statute is "to give effect to the intent of Congress," *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed.1345 (1940), we look to the legislative history for evidence of Congress's intent. Two legislators who appear to have been the most involved with the Act's development and passage spoke at length regarding the meaning of "original source." Representative Berman, a co-drafter of the legislation, stated that a person is an "original source", if *inter alia*, the person "had some of the information related to the claim which he made available to the government or the news media *in advance of the false claims being publicly disclosed.*" 132 Cong.Rec. H9389 (daily ed Oct. 7, 1980) (emphasis added). Similarly Senator Grassley, who introduced the legislation in the Senate noted that the jurisdictional requirements of §3730(e)(4) barred a person "who had not been an original source to the entity that disclosed the allegations" from bringing a *qui tam* claim based on publicly disclosed information. 132 Cong.Rec. S20535 (daily ed. Aug. 11, 1986) (emphasis added). If §(4)(B) contained the exclusive requirements that a *qui tam* plaintiff must satisfy to be an "original source," these legislators' statements would be somewhat inexplicable. However, their statements made much sense if § (4)(A) contains an additional requirement to be considered an "original source," namely that to be considered an "original source" one must have been a source to the

> entity that first publicly disclosed the information on which a suit is based. Given the foregoing, we are constrained to adopt a reading of the statute in accord with those statements.

In its decision dismissing the action, the court conceded that "There is no question that Devlin, by his participation in the interview with the *Mariposa Gazette* reporter, "had a hand in the public disclosure of allegations that are part of [this] suit." The court also conceded that the Relators had been told by Cotey how he perpetrated the fraud and had documentary evidence provided by Cotey. Thus, the Relators meet the requirements of being an "original source" *United States ex rel. Dick v. Long Island Lighting Co.* 912 Fed.2d 13 (2nd Cir. 1990), *supra.*

## CONCLUSION

There can be no question that the Appellants/Relators were responsible for giving reporter Jerry Rankin the information that went into the public disclosure in the Mariposa Gazette. Equally clear is that Appellants/Relators had separate, independent proof of the fraud in the form of discussions with William Cotey and Cotey's documentary evidence and furnished this information to government officials including the F.B.I. and members of the U.S. House of Representatives. Thus, they qualify as the original source of the information as that term is defined in the False Claims Act.

The order of the district court dismissing the action for lack of subject matter jurisdiction should be reversed and remanded to the district court for further proceedings in keeping with such an order.

DATED: December 13, 1993

/s/ William Devlin
William Devlin

/s/ Rod Kodman
Rod Kodman

/s/ Stanley H. Sidicane
Stanley H. Sidicane

---

PROOF OF SERVICE BY MAIL

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 651 East Hampton Way, Fresno, California 93704.

On December 13, 1993, I served the within OPENING BRIEF OF APPELLANTS on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California addressed as follows:

U.S. COURT OF APPEALS, NINTH CIRCUIT (15 copies)
121 Spear Street, Second Floor
San Francisco, California 94105

U.S. DISTRICT COURT (1 copy)
Eastern District of California
1130 O Street
Fresno, California 93721

Steve W. Dahlem (1 copy)
WALTON, DAHLEM & CONNINGS
P.O. Box 1907
Mariposa, CA 95338

Jeffrey G. Green (1 copy)
Mariposa County Counsel
P.O. Box 189
Mariposa, CA 95338

Theodore Garelis, Deputy AG (1 copy)
P.O. Box 944255
Sacramento, CA 94244-2550

Anthony Alexis (1 copy)
U.S. Department of Justice
Civil Litigation Branch
P.O. Box 261 Ben Franklin Station
Washington, D.C. 20044

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 13, 1993.

/s/ Melissa Valgeirsson
Melissa Valgeirsson

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel.
WILLIAM DEVLIN, et al.

Plaintiff/Appellant

vs. CASE NO. 93-16729

STATE OF CALIFORNIA, et al

Defendants/Appellees

STATEMENT OF RELATED CASES

Comes now the Plaintiff and Appellant and submits this statement of related cases as required by Rule 28-2.6.

There are no known related cases pending in this court.

/s/ Stanley H. Sidicane
Stanley H. Sidicane, Relator

---

PROOF OF SERVICE BY MAIL

STATE OF ALABAMA )
)
COUNTY OF LEE )

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 740 Lee Road 400, Opelika, AL 36801.

On December 22, 1993 I served the foregoing Statement of Related Cases on the interested parties in said action, by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Fresno, California, addressed as follows:

United States Court of Appeals (15 copies)
121 Spear Street, Second Floor
San Francisco, CA 94105

Stephen W. Dahlem, Esq. (1 copy)
5320 Highway 49 North, Suite 1
Mariposa, CA 95338

Jeffrey G. Green (1 copy)
Mariposa County Counsel
P.O. Box 184
Mariposa, CA 95338

Theodore Garelis, Deputy Attorney
General (1 copy)
P.O. Box 944255
Sacramento, CA 94244-2550

Anthony Alexis, Esq. (1 copy)
U.S. Department of Justice
Civil Litigation Branch
P.O. Box 261
Ben Franklin Station
Washington, DC 20044

I declare under penalty of perjury that the foregoing is true and correct. Executed December 22, 1993.

/s/ Janet Covington
Janet Covington

NO. 93-16729

---

**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

Plaintiff/Appellant,

v.

STATE OF CALIFORNIA COUNTY OF MARIPOSA, *et al.*

Defendants, Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. ROBERT E. COYLE, JUDGE
CV-F-92-5086-REC

---

# REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

---

STANLEY H. SIDICANE
WILLIAM DEVLIN
ROD KODMAN
651 East Hampton Way
Fresno, CA 93704
(209) 225-6639

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NO. 93-16729

---

**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

Plaintiff/Appellant,

v.

STATE OF CALIFORNIA COUNTY OF MARIPOSA, *et al.*

Defendants, Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

HON. ROBERT E. COYLE, JUDGE
CV-F-92-5086-REC

---

# REPLY BRIEF OF APPELLANT UNITED STATES OF AMERICA, *ex rel.* WILLIAM DEVLIN, *et al.*

---

## INTRODUCTION

On February 11, 1992, Relators William Devlin, Rod Kodman and Stanley Sidicane filed a *qui tam* action under the False Claims Act against the State of California, several counties of that state and various officials of those counties.

Thereafter, defendants Tom Archer and the County of Mariposa filed a Motion to Dismiss the complaint claiming that the District Court did not have jurisdiction of the subject matter of the action. They alleged Plaintiffs/Appellants were not the "original source" of the information based upon the fact that prior to the filing of the action, the Mariposa Gazette published an article containing some of the facts contained in this suit. This motion was based upon 31 U.S.C. Section 3730(e)(4) which provides as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

In Appellants/Relators opposition, they showed conclusively that they had possessed information related to the fraud prior to the disclosure in the Mariposa Gazette, that the article was based upon information given the newspaper by Relator Devlin and others and that prior to

the publication of the article they had documentary evidence explaining how the fraud was committed.

## I. APPELLANTS/RELATORS DEMONSTRATED CONCLUSIVELY BASED ON UNDISPUTED FACTS THAT THEY WERE THE ORIGINAL SOURCE OF THE INFORMATION ON WHICH THE ACTION WAS BASED.

---

The case of *United States ex rel. Dick v. Long Island Lighting Co.*, (2nd Cir. 1990) 912 Fed.2d 13 explains the meaning of the term "original source" as congress intended it to be used. The term means the original source of the public disclosure, not the original source discovering the fraud against the United States. Thus the conclusion reached by the District Court was clearly in error. *United States ex rel. Dick v. Long Island Lighting Co., supra.* states in pertinent part as follows:

> Since our fundamental task in interpreting a statute is "to give effect to the intent of Congress," *United States v. American Trucking Ass'ns,* 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940), we look to the legislative history for evidence of Congress's intent. Two legislators who appear to have been the most involved with the Act's development and passage spoke at length regarding the meaning of "original source." Representative Berman, a co-drafter of the legislation, stated that a person is an "original source", *if inter alia,* the person "had some of the information related to the claim which he made available to the government or the news media *in advance of the false claims being publicly disclosed.*" 132 Cong.Rec. H9389 (daily ed Oct. 7,

> 1980) (emphasis added). Similarly Senator Grassley, who introduced the legislation in the Senate noted that the jurisdictional requirements of §3730(e)(4) barred a person "who had not been an original source to the entity that disclosed the allegations" from bringing a *qui tam* claim based on publicly disclosed information. 132 Cong.Rec. S20535 (daily ed. Aug. 11, 1986) (emphasis added). If §(4)(B) contained the exclusive requirements that a *qui tam* plaintiff must satisfy to be an "original source," these legislators' statements would be somewhat inexplicable. However, their statements made much sense if §(4)(A) contains an additional requirement to be considered an "original source," namely that to be considered an "original source" one must have been a source to the entity that first publicly disclosed the information on which a suit is based. Given the foregoing, we are constrained to adopt a reading of the statute in accord with those statements.

This case was cited with approval by the 9th Circuit Court of Appeals in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992).

In its memorandum opinion dismissing the action, the court conceded that "There is no question that [Relator] Devlin, by his participation in the interview with the *Mariposa Gazette* reporter, "had a hand in the public disclosure of allegations that are part of [this] suit." The order of the court also conceded that the relators had been told by Cotey how he perpetrated the fraud and had documentary evidence provided by Cotey.

The declaration of Jerry Rankin, the reporter who wrote the article in the Mariposa Gazette upon which the

Motion to Dismiss was based was included in the opposition to that motion. It clearly showed that Relator Devlin was responsible for giving that reporter the information upon which the article was based. Devlin was at that newspaper with William Cotey (one of the perpetrators of the fraud) and his wife when they discussed the fraud with Rankin. The declaration of Jerry Rankin appears in the Clerk's Transcript 63, Exhibit C and states as follows:

> Jerry Rankin declares as follows:
>
> 1. I am a reporter for the Mariposa Gazette and was employed in this capacity on or about January 13, 1992.
>
> 2. On or about January 13, 1992, I was in the office of the newspaper during the evening William Devlin, Deborah Cotey and William Cotey used the newspaper's copier to photocopy some documents.
>
> 3. During the course of their copying those documents, I discussed with them the problems that William Cotey was having with Child Protective Services of Madera County. During the course of that conversation, I learned that the documents they were copying contained records of alleged fraud by Mariposa County whereby the county and its employees allegedly falsified records to increase their Federal funding. At this time, I discussed this alleged fraud with Mr. Cotey, Deborah Cotey and William Devlin.
>
> 4. Sometime after this conversation, I contacted William Cotey again and had a conversation with him during which he gave me further details regarding this alleged fraud.

> 5. On February 6, 1992, the Mariposa Gazette published an article written by me describing this alleged fraud and a petition to the grand jury presented by Mr. Cotey. This article began with the headline "Grand Jury asked to probe Child Protective Services"

I declared under penalty of perjury that the foregoing is true.

/s/ Jerry Rankin Date 6-25-93.

The opposition by the Relators also contained the declaration of William Devlin (CT 63, exhibit a) which stated that he was the one that drafted the request for the Mariposa County Grand Jury to investigate the local Child Protective Services agency. Devlin also declared that he made an independent investigation of Cotey's allegations and confirmed by independent witnesses that the fraud did exist.

The opposition also contained the declaration of Relator Rod Kodman (CT 63, exhibit B) outlining that he had informed the F.B.I. and various other branches of the government of the fraud prior to the action being filed. These contacts also transmitted independent evidence related to thee [sic] fraud to the various government officials and agencies.

In their Motion for Reconsideration (C.T. 69) Relators appended numerous documents including copies of cards used by William Cotey to document the fraud he had perpetrated on the United States. The declaration of William Devlin included in this Motion showed that he had copies of this documentary evidence prior to the publishing of the Mariposa Gazette article.

It cannot be disputed that the Relators meet the requirements of being an "original source" since they had direct and independent knowledge of the information on which the allegations were based and had voluntarily provided this information to various officials of the Government before filing this action.

As this court stated in approving *United States ex rel. Dick v. Long Island Lighting Co., supra.* "A qui tam plaintiff "must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based *Wang, ex rel. United States v. FMC Corporation* (9th Cir. 1992) 975 Fed.2d 1412. It is eminently clear that Relators qualify as the "original source" under this definition.

## CONCLUSION

Based on the clear evidence that Relators constitute the "original source" of the information upon which the suit was based as defined by the False Claims Act and case law, this court should reverse the decision of the District Court dismissing the action and allow the action to go forward so that the fraud perpetrated upon the United States may be redressed by an award of appropriate damages.

DATED: February 15, 1994

THE UNITED STATES OF AMERICA

/s/ Illegible
Relator

PROOF OF SERVICE BY MAIL

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 740 Lee Road 400, Opelika, AL 36801.

On February 15, 1994, I served the within REPLY BRIEF OF APPELLANT on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Opelika, Alabama addressed as follows:

U.S. COURT OF APPEALS, NINTH CIRCUIT
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121 Spear Street, Second Floor
San Francisco, California 94105

U.S. DISTRICT COURT (1 copy)
Eastern District of California
1130 O Street
Fresno, California 93721

Steve W. Dahlem (1 copy)
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Mariposa, CA 95338

Jeffrey G. Green (1 copy)
Mariposa County Counsel
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Mariposa, CA 95338

Theodore Garelis, Deputy AG (1 copy)
P.O. Box 944255
Sacramento, CA 94244-2550

Anthony Alexis (1 copy)
U.S. Department of Justice
Civil Litigation Branch
P.O. Box 261 Ben Franklin Station
Washington, DC 20044

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 15, 1994.

/s/ Janet Covington
Janet Covington